

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS: 02-0319
Gross Retail Tax
For the Years 1991 through 2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Taxpayer Acting in an Agency Capacity – Gross Retail Tax.

Authority: IC 6-2.5-1-2; IC 6-2.5-1-8; IC 6-2.5-2-1(a); IC 6-2.5-4-10(a); 45 IAC 2.2-4-27(c); Black's Law Dictionary (7th ed. 1999).

Taxpayer argues that it was not required to collect gross retail (sales) tax on the price it charged its customers when the customers acquired copies of tax survey maps because taxpayer was merely acting as an agent for the county which retained ownership of the original map information.

II. Land Survey Maps as Tangible Personal Property – Gross Retail Tax.

Authority: IC 6-2.5-1-1; IC 6-2.5-1-2; 45 IAC 2.2-4-1.

Taxpayer maintains that because the land survey maps did not constitute tangible personal property, taxpayer was not required to collect sales tax on the price it charged its customers to acquire the maps.

STATEMENT OF FACTS

Taxpayer is in the mapmaking business. Taxpayer developed land survey maps for an Indiana county. In turn, taxpayer entered into a "marketing agreement" with that county allowing taxpayer to "lease" collections of the land survey maps to the public. In exchange for the right to transfer this proprietary information, taxpayer paid the county a royalty fee for each set of maps transferred. Taxpayer's customers included governmental entities, libraries, realtors, land developers, attorneys, and other commercial enterprises. In acquiring these map compilations, each customer signed a "lease agreement" in which the customer agreed to not to copy the map information and to return to taxpayer the compilation after twelve months.

The Department of Revenue (Department) conducted an audit of taxpayer's business records. The Department decided that taxpayer should have been collecting sales tax on the price it charged individual customers for the right to use the map compilations. The Department sent taxpayer notices of "Proposed Assessment." Taxpayer disagreed with the basis for the

assessments, submitted a protest to that effect, an administrative hearing was held in which taxpayer explained the basis for its protest, and this Letter of Findings results.

DISCUSSION

I. Taxpayer Acting in an Agency Capacity – Sales Tax.

Taxpayer argues that the money it received from transferring land survey books to individual customers was not subject to sales tax because taxpayer was merely acting as an agent for the county which retained control and ownership of the map information. According to taxpayer, the county “retains its ownership [of the maps] and the information contained therein.” Taxpayer’s argument is that it is merely providing a service on behalf of the county, and the money it receives is not subject to sales tax.

Each time a customer acquires a land survey book from taxpayer, the customer signs a “Lease Agreement.” In that agreement, taxpayer is referred to as the “lessor.” The customer is called the “lessee.” The object of the transaction – the land survey book – is referred to as the “edition,” the “volume,” and the “items delivered.” In signing the agreement, the customer (lessee) agrees to pay a fixed “rental fee.”

In Indiana, “An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.” IC 6-2.5-2-1(a). The state requires that all “retail merchants” collect the sales tax on “retail transactions” that occur within the state. IC 6-2.5-1-2; IC 6-2.5-1-8.

The gross retail tax is also applicable to certain lease and rental transactions. IC 6-2.5-4-10(a) states that “A person, other than a public utility, is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person.”

The regulation helps explain the statute. 45 IAC 2.2-4-27(c) states as follows:

In general, the gross receipts from renting or leasing tangible personal property are subject to tax. The rental or leasing of tangible personal property constitutes a retail transaction, and every lessor is a retail merchant with respect to such transactions. The lessor must collect and remit the gross retail tax or use tax on the amount of actual receipts as agents for the state of Indiana. The tax is borne by the lessee, except when the lessee is otherwise exempt from taxation.

It would appear from the face of the parties’ agreement, that the object of each particular transaction is the transfer – albeit temporary – of a land survey book from taxpayer to the customer. In consideration for that transfer, the customer pays taxpayer a rental fee. Taxpayer’s expertise may be in the assembling of information and the preparation of maps, but in the transactions here at issue, the customer is not buying taxpayer’s services – the customer is renting a book of maps. The character and nature of its “Lease Agreement” brings these transactions within the purview of the state’s gross retail tax. Taxpayer – in providing the land survey books – is acting as a “retail merchant” entering into “retail transactions” when it collects money from its customers in exchange for the right to possess and use the books for twelve

months. The fact that each customer is obligated to return the land survey books after one year is irrelevant; such a stipulation is inherent in the nature of any rental or lease arrangement.

Taxpayer's agency argument is somewhat underdeveloped. Presumably, taxpayer maintains that it is merely acting as an agent for the county when it collects the rental fees. However, there is no indication that taxpayer and the county ever intended to enter into such a relationship. The agreement between the taxpayer and the county simply states that "[taxpayer] will pay [county] a royalty fee of ten percent (10%) of the commercial sale price on all commercial sales made by [taxpayer] from the County's tax map master and aerial photos." In contrast, an agency agreement is characterized as a "fiduciary relationship created by express or implied contract or by law in which one party (the *agent*) may act on behalf of another party (the *principal*) and bind that other party by words or actions." Black's Law Dictionary 62 (7th ed. 1999) (*Emphasis in original*). The agreement between taxpayer and the county is not an agency agreement because taxpayer is not authorized to act on behalf of the county, taxpayer is not authorized to bind the county, and the county is not made responsible for the acts of the taxpayer. Instead, the agreement is simply a royalty contract which requires taxpayer to pay the county a set portion of the money taxpayer receives for leasing the land survey books.

Taxpayer is a retail merchant receiving money from leasing land survey books. The audit was correct in determining that taxpayer should have been collecting sales tax from its customers.

FINDING

Taxpayer's protest is respectfully denied.

II. Land Survey Maps as Tangible Personal Property – Sales Tax.

Taxpayer challenges the assessment on the ground that it was not leasing "tangible personal property," but it was merely providing services to its customers. Taxpayer supports that argument by pointing out that it could have delivered this same intangible information to customers by other means than providing customers with a book of paper maps. For example, taxpayer states that this information could have been provided by means of a fax machine or that the information could have been distributed over the internet.

The preparation of the land survey books is – of course – heavily dependent on taxpayer's skill and expertise in assembling and compiling information into a tangible form. The land survey books are themselves simply an assemblage of paper, ink, and bindings. However, when taxpayer rents the land survey books to a customer, it is entering into a "unitary transaction" under 45 IAC 2.2-4-1. The regulation states as follows:

(a) Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a "retail merchant."

(b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:

- (1) The price arrived at between purchaser and seller.
- (2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer.
- (3) No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to the transfer of such property at retail.

The regulation derives from IC 6-2.5-1-1 which states that a “unitary transaction” includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated.” A “retail unitary transaction” occurs when a retail merchant purchases tangible personal property in his ordinary course of business and then sells that property along with services as a unitary transaction. IC 6-2.5-1-2.

The object of the lease transaction is the temporary transfer of a land survey book from taxpayer to customer. Although taxpayer’s services were necessary to initially assemble and prepare the book, the customer is not leasing taxpayer’s services; the customer is merely leasing the book for a fixed price for a fixed term. Taxpayer’s lease of its land survey books is analogous to the consumer rental of a video tape. In the same way that a video store is responsible for collecting sales tax on each rental of a DVD or video tape, taxpayer is responsible for collecting sales tax each time it leases one of its land survey books. Although the originator of both the DVD and the land survey books may have expended considerable effort (services) in preparing both items, nonetheless, the subsequent rental of both the DVD and the land survey book is subject to the sales tax.

FINDING

Taxpayer’s protest is respectfully denied.

DK/JM/MR – 032205